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No. ..-..

IN THE

Supreme Court of the United States

October Term, 1983

RODNEY E. DOMINEY,

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. Whether a court should determine an issue of causation in a Federal Employers' Liability Act case as a matter of law when a jury found that a railroad violated its own safety order, that that violation was negligence, but that the railroad's negligence did not cause, in whole or in part, its employee's crippling injuries.

2. Whether a district court may apply a local rule in direct contravention of the Seventh Amendment to the United States Constitution and to Rule 59 of the Federal Rules of Civil Procedure, thereby effectively denying the Petitioner the right to obtain juror affidavits in support of his motion for a new trial; and where the jury's finding was illogical in light of all the evidence presented, thereby raising a serious question as to whether Petitioner received a fair trial.

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THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,

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PETITION FOR WRIT OF CERTIORARI.

Petitioner, Rodney E. Dominey, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit.

THE OPINIONS BELOW.

The Court of Appeals rendered its decision by unpublished Memorandum Opinion, No. 82-1531, reproduced at Appendix 1. The unpublished Memorandum Opinion of the Court of Appeals on Rehearing is reproduced at Appendix 2.

JURISDICTION.

1. This is an action brought under the Federal Employers' Liability Act in which the Plaintiff-Petitioner, Rodney E. Dominey (hereinafter Dominey) contends that the Defendant-Respondent, the Atchison, Topeka & Santa Fe Railroad Co. (hereinafter Santa Fe), was liable for crippling injuries he suffered during the course of his employment with the railroad.

2. The first opinion below was filed on July 25, 1983. A timely petition for rehearing was granted on September 19, 1983. The opinion following the rehearing was filed on March 20, 1984.

3. The jurisdiction of the United States District Court in which this action was brought was based on 28 U.S.C. §1291.

4. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED.

The Seventh Amendment, United States Constitution, provides:

> "[t]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 51 of Title 45 of the United States Code provides in pertinent part:

> Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 2071 of Title 28 of the United States Code provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules

shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

Section 2072 of Title 28 of the United States Code provides in pertinent part:

> The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts. . . .
>
> Such rules shall not abridge, enlarge or modify any substantative right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Rule 83 of the Federal Rules of Civil Procedure provides:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . .

Rule 59 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .
>
> (b) Time for Motion. A motion for a new trial shall be served *not later than 10 days after the entry of the judgment.*
>
> (c) Time for Serving Affidavits. When a motion for new trial is based upon *affidavits* they *shall be served with the motion.* . . . (emphasis added)

Local Rule 8.2(d) for the Northern District of Texas provides:

> Contact with Jurors. A party, an attorney in a case, or any representative of either shall not, before or after trial, contact any juror, prospective juror, or a juror's relatives, friends, or associates, except upon explicit leave of the Court.

STATEMENT OF THE CASE.

Procedural Statement.

This case was tried to a jury which decided that the Santa Fe's conduct violated its own safety order, that this violation was negligence, but which failed to find that such negligence was a legal cause in whole or in part, no matter how small, of Petitioner Dominey's injuries. Judgment was entered on the verdict directing that Dominey be denied recovery for his injuries. A Motion for Judgment non obstante verdicto or, in the alternative, A Motion for a New Trial, filed on behalf of Dominey was denied. The trial court invoked a local rule and denied Dominey timely permission to interview jurors and obtain affidavits to support his Motion for a New Trial. Petitioner Dominey seeks review of the affirmance of the District Court's judgment which denied him compensation under the Federal Employers' Liability Act for serious injuries caused by the railroad's negligence when Dominey was crushed between a moving locomotive and a caboose rolling in opposite directions.

STATEMENT OF THE FACTS.

The injury of which the Petitioner complains occurred under circumstances which are very difficult to understand without reference to photographs and diagrams. (The Court of Appeals used a sentence of 119 words in a futile attempt to explain what happened. Appendix 1 (page 4).) Therefore, Petitioner Dominey lodges Exhibits A, B, and C to aid the Court. Exhibit A is a

series of photographs which portray the type of equipment and switching areas involved. Exhibit B is a step-by-step diagram of the drop/switching movement. Exhibit C is a Santa Fe map of the scene of the accident made by Santa Fe engineers the day after Dominey's accident. It shows that *all* activities occurred within this zone of danger.

Dominey urges the Court to stop here and study these exhibits before reading the remainder of his brief. The Court then will be more easily able to understand the sequence of events which led to the Petitioner's disabling injuries.

Dominey was employed as a brakeman/conductor by the Santa Fe railroad. He was injured on November 7, 1979 on the "Maryneal Turn," a Santa Fe job assignment which involved operating a train, and delivering and picking up railroad cars, from the yards in Hamlin, Texas, through Sweetwater, to Maryneal and back to Hamlin. The crew consisted of Engineer Bell, Head Brakeman Clark, Rear Brakeman Aydellote, and Conductor Dominey. The train was powered by two locomotives connected back to back.

Bell and Clark were riding in the forward locomotive which malfunctioned. This caused smoke to come into the cab.[1] By the time the train reached Maryneal, the smoke had become intolerable. Therefore, Bell and Clark asked Dominey to agree to reverse the positions of the engines for the return trip to Hamlin by performing a "drop switching" movement. The mechanics of "drop switching" movements are easier to understand by referring to Exhibit B.

In order to reverse the locomotive positions, the caboose had to be "dropped" from the rear of the trailing engine and "switched" to the front of the malfunctioning locomotive. This would change the malfunctioning loco-

[1]In addition, the radio in the lead engine was not operating.

motive to the rear position for the return trip. The engines would be directed forward from the main line onto a parallel siding, Exhibit B (page 2), the caboose would be allowed to roll free on the main track past this siding, Exhibit B (page 3), and the engines then would be backed up from the siding onto the main line. Exhibit B (page 3). The trailing engine thus would become the "lead" locomotive for the return trip.

The drop switching movement began when the train (two locomotives and a caboose) pulled forward to the switch which controlled movement into the siding where the drop would be made. Exhibit B (page 1). Aydellote took up his position at the switch. He controlled the entire movement and, in addition, acted as Engineer Bell's "eyes" during the locomotive back-up portion of the move because the lead locomotive's radio did not work properly. The engines backed up the caboose for the forward movement. Dominey was riding on the caboose in order to pull the pin when Aydellote directed him to do so. Engineer Bell accelerated the engines. Dominey pulled the pin lifter which permitted the mechanical separation of the caboose from the locomotives. Bell increased his speed and Aydellote threw the switch which caused the locomotive to go into the siding. The caboose was coasting free down a slight decline in the same direction. Aydellote threw the switch so that the caboose would stay on the main line.

Aydellote then gave Bell a stop sign, followed by an immediate back-up sign, even though the caboose had not yet cleared the fouling/clearance point ("zone of danger") created by the siding track and the main line. Exhibit B (page 3). This was in specific violation of a Santa Fe safety order. Bell began his back-up movement without sounding his whistle as specifically required by Santa Fe safety rules.

In the meantime, the caboose dramatically slowed to below a walking speed. Before it got through the fouling point (out of the "zone of danger"). Dominey feared that the caboose would foul (block) the switch, thereby preventing the switching movement. Dominey stepped off the caboose in the proper manner (facing the caboose and with his back to the locomotives) and began inspecting the caboose's braking mechanism. Exhibit A (page 1). He was struck by the engines backing at Aydellote's direction toward the switch within the "zone of danger," Exhibit B (page 3), pinned and twisted between the caboose which he had been inspecting and the backing locomotives, causing his body to be crushed between the equipment moving in opposite directions.

Dominey's body was finally thrown loose. He almost died. He suffered multiple fractures to his ribs, a broken thumb, flail chest, internal derangement of his right shoulder, and bruises to his heart. He has developed hypertension as permanent residue of the tremendous trauma caused by the accident. He has never been physically able to return to work for the railroad.

At trial, the jury found that the Santa Fe violated its own safety rule which prohibited its employees from directing the locomotives to back up before the caboose on which Dominey was riding was clear of the fouling/clearance, or "zone of danger," point; it found that this was negligence. Inexplicably, the jury found that this negligence was not the legal cause, even in part, of Dominey's injuries.

Stunned by the jury's failure to find legal cause because such a finding was so at odds with the evidence presented, with common sense, and was, indeed, internally inconsistent, Dominey immediately considered the possibility of juror misconduct. He instantly made an oral motion requesting permission to interview the jurors in order

to provide the required affidavits for a motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure.[2] The court denied the oral motion; it did, however, grant leave to file a written motion. Dominey immediately filed a written motion. The Santa Fe filed an opposition to this motion.

Meanwhile, the clock was running on the ten days allowed in which to file a motion for a new trial. Fed. R. Civ. P. 59(b). "When a motion for new trial is based upon affidavits they shall be served with the motion." Fed. R. Civ. P. 59(c) Dominey was forced, therefore, to file his motion for a new trial without juror affidavits. The Santa Fe did not file an opposition to Dominey's motion for a new trial. The court finally ruled on Dominey's motion to interview the jurors twenty-one days after the entry of judgment, and eleven days after the expiration of the time permitted by Federal Rules of Civil Procedure 59(b) and 59(c). Dominey was effectively prohibited from access to Rule 59(c): The local rule denying juror interviews thus created a Catch-22 situation in which motions for a new trial based on juror misconduct will almost always be denied not on their merits but because they are untimely.

Dominey also filed a motion for judgment n.o.v. because there could have been but one reasonable conclusion in this case: The Santa Fe had violated its own safety rules; it was negligent. Therefore, as a matter of law, the Santa Fe's negligence was the cause of Dominey's injuries.

Nevertheless, the trial court denied both motions. The Fifth Circuit Court of Appeals affirmed the judgment of the trial court. The Circuit Court stated that the "effect"

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[2]The district court's local rules forbade interviews with jurors without the express permission of the court. Local Rule 8.2(d) (N. D. Tex.).

of the jury's finding that the Santa Fe's negligence was not the cause of Dominey's injuries meant that Dominey must have been the sole cause of his injuries. Appendix 1 (page 3). On rehearing, the Court of Appeals again affirmed the judgment, stating that the jury could have found that the Santa Fe's negligence was "solely related to avoidance of an equipment collision." A collision of the equipment might have resulted in an insurance claim. It is difficult to see how the mere "avoidance of an equipment collision" is related to the negligence the jury found, or "that Dominey should not have stepped off the caboose, or that such action or some momentary diversion of Dominey's attention was the sole cause of his being struck by the locomotive." Appendix 2 (page 2).[3]

Petitioner has suffered grievous injuries where the jury found that the Santa Fe was negligent but, contrary to the intent of Congress under the FELA, has been left with no compensation for those injuries, unless this Court grants relief in the form of an order for a new trial. The real tragedy, to the jury system and to Congressional intent as to that method to enforce the FELA, however, is that an obscure local rule has effectively foreclosed the possibility of review of juror misconduct, thus seriously impairing the worth of the right to a jury trial.

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[3]At oral argument during Rehearing, the Court of Appeals inquired if there was any evidence concerning the cigarette lighter which the Petitioner allegedly was retrieving when he was crushed between the moving equipment. Petitioner explained in a subsequent letter that a statement made to that effect "was purely 'hearsay' and not probative since not under oath." Appendix 3. Fed. R. Evid. 801(d)(1)(A)[1], 802; *Garcia v. United States,* 530 F.2d 650 (5th Cir. 1976); *United States v. Ragghianti,* 560 F.2d 1376, 1381 (9th Cir. 1977).

REASONS FOR GRANTING THE WRIT.

I.
INTRODUCTION.

A. The Lower Court's Misapprehension of the Causation Issue Is by Itself a Sufficient Reason for Granting the Writ.

This Court has not spoken on the issue of causation and the role of the jury in Federal Employers' Liability Act cases since *Gallick v. Baltimore and Ohio Railroad Co.*, 372 U.S. 108 (1963). *Gallick* expanded on the rule of *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957), that if a railroad's "negligence played any part, even the slightest," in an employee's injuries, the railroad is liable for those injuries. In spite of the apparent clarity of the Court's statement, further clarification of the rule of *Rogers* is needed.

The court below purported to follow *Rogers* because "[c]ausation was a fact issue for the jury." Appendix 2 (page 2). The implication is that causation in FELA cases is always a question of fact for the jury. *Rogers* did not so hold: "[W]here fair-minded jurors cannot honestly differ [as to] whether fault of the employer played any part in the employee's injury," causation is not a matter for jury consideration. *Id.* at 510. The drop switching movement was required because a Santa Fe engine malfunctioned, spewing smoke into the cab. Its radio was inoperative, forcing the engineer to visually (and negligently) direct the movement of the engines. The engines were backed up without a warning whistle. It is inconceivable that fair-minded men could differ as to whether these negligent acts caused Petitioner's injuries, at least in part. That is all that is required for a finding of liability under the Act. Thus, the defendant was negligent as a matter of law. The Fifth Circuit needs

this Court's instruction on causation in FELA cases where liability is so clear that reasonable men could not differ.

When Congress enacted the Federal Employers' Liability Act (FELA), it did not "crystallize the application of the Act by enacting specific rules to guide the courts." *Kernan v. American Dredging Co.*, 355 U.S. 426, 437 (1958). It is, therefore, up to the courts to determine consistent principles which will provide uniform application of the FELA to all injured railroad employees. Petitioner will show that he has been denied application of the FELA principles set down by this Court in *Rogers* and followed by most of the district courts. The Fifth Circuit requires this Court's direction because the Circuit's misconstruction of the causation issue threatens the uniform administration of a federal statute; it has effectively barred Petitioner from obtaining compensation for injuries clearly caused by the railroad's negligence.

B. Even if Causation Were a Jury Issue, the Local Rule Has Destroyed Review of Juror Misconduct.

Petitioner cannot even be certain that the jurors in his case were "fair-minded." The district court denied a timely oral motion and demanded a written motion requesting permission to interview the jurors under Local Rule 8.2(d). Since at least 1892, this Court has approved interviews with jurors and affidavits showing misconduct as a basis for a new trial. *Mattox v. United States*, 146 U.S. 140 (1892). Federal Rule of Civil Procedure 59(c) allows juror affidavits in support of a motion for a new trial. Yet, the district court applied a local rule in contravention of the Court's holding in *Mattox* and a Federal Rule of Civil Procedure: It did not grant permission to interview the jurors until twenty-one days after entry

of judgment which was eleven days after the ten days allowed to file affidavits in support of a motion for a new trial under Rule 59(b). This is a "threat to the goal of uniformity of federal procedure." This Court firmly rejected such threats to uniformity within a slightly different context in *Hanna v. Plumer*, 380 U.S. 460, 463 (1964). At least sixteen district courts have a similar local rule. Federal Local Court Rules, Callaghan (1983). Thus, beyond Petitioner's plight, the district courts need the authoritative guidance of this Court: A local rule should not be drafted or applied so as to thwart a Federal Rule of Civil Procedure or the Seventh Amendment to the United States Constitution.

II.

THERE IS CONFLICT BETWEEN THE CIRCUITS AS TO THE MEANING OF THE ROGERS "TEST" WHICH THREATENS UNIFORM APPLICATION OF A FEDERAL STATUTE.

In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957) this Court stated that "for practical purposes the inquiry in these [FELA] cases today rarely presents more than the single question whether the negligence of the employer played any part, *however small,* in the injury or death which is the subject of the suit." *Id.* at 508 (emphasis added). This Court also stated that "[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought." *Id.* at 506 (emphasis added). The circuit courts need the Court's guidance as to whether *Rogers* presents only the test of a jury case or if it also lays down a test of causation.

The FELA and Jones Act provide the "framework" to implement the general congressional intent to provide

liberal recovery for injured workers. *Kernan v. American Dredging Co.*, 355 U.S. at 432.[4] Petitioner contends that the Fifth Circuit has thwarted congressional intent because in his case the Fifth Circuit refused to apply the *Rogers* test of causation.

A. Not All FELA Cases Present a Jury Question as to Causation.

In *Rogers*, the Court noted its earlier decisions which held that, under appropriate circumstances, the question of causation in FELA cases should be determined as a matter of law. In particular, the Court found that no jury question was presented in *Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573 (1951); *Eckenrode v. Pennsylvania Railroad Co.*, 335 U.S. 329 (1948); *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943). Some circuits maintain, however, that *Rogers* did not set up a test of liability but, rather, "the test of a jury case." *Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 573-74 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961); *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770 (9th Cir. 1981); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 681 (10th Cir. 1981). The circuits are in conflict.

B. Other Circuits Agree With Petitioner's Contention That Liability Follows Negligence if It Played Any Part in Petitioner's Injuries.

The First Circuit recently discussed the causation issue in *Santana v. United States*, 572 F.2d 331 (1st Cir. 1977). There, the employee slipped and was injured when he fell on greasy hoses and cables spread across the deck. *Id.* at 333. The First Circuit cited *Rogers* for the proposi-

[4]The standard of liability under the Jones Act is governed by the substantive provisions of the FELA. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957). Accordingly, Jones Act and FELA precedent will be analyzed interchangeably.

tion that a "plaintiff need show only that defendant's negligence *or* the dangerous condition was a cause of plaintiff's injuries." *Id.* at 335 (emphasis added). Again, in *Peymann v. Perini Corp.*, 507 F.2d 1318, 1324 (1st Cir. 1974), *cert. denied*, 421 U.S. 914 (1975), the court cited *Rogers* for the idea that liability follows if there is a "connection" between defendant's negligence and the employee's injury, but the negligence "need not be *the* cause" in order for the plaintiff to recover. *Id.* at 1324 (emphasis in Opinion).

Similarly, the Second Circuit views *Rogers* not as a test of a jury question, but as a test of causation. In *Miller v. Erie Lackawanna Railway Co.*, 645 F.2d 140 (2d Cir. 1981), the issue was whether the court erred in finding that the plaintiff had not suffered any aggravation of a previous injury as a result of the railroad's negligence. *Id.* at 141. The Court of Appeals treated the *Rogers* test not as a test for a jury case, but as a test of causation, and reversed the trial court's decision. *Id.* at 144. *See also Farnarjian v. American Export Isbrandtsen Lines, Inc.*, 474 F.2d 361, 363, (2d Cir. 1973); *DeLima v. Trinidad Corp.*, 302 F.2d 585, 587-88 (2d Cir. 1962).

C. The Fifth Circuit Has Ignored Its Own Precedent.

The Fifth Circuit has dealt with the issue of causation in FELA or Jones Act cases in *Reyes v. Vantage Steamship Co.*, 558 F.2d 238 (5th Cir. 1977); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965). Each case presented facts similar to those in the instant case. In each case, the court appears to have treated the *Rogers* test as one of causation.

In *Reyes*, a seaman drowned after jumping overboard to swim. The employer had violated a safety regulation

by failing to have a lifeline apparatus on board. The Fifth Circuit held that the issue of legal causation was established under the evidence as a matter of law. 558 F.2d at 243-44.

Spinks involved a seaman who fell and was injured on the very deck he was washing down with a co-worker in a negligent manner. Although the trial court found that the seaman's negligence was the "sole proximate cause" of his injury and the co-worker also was negligent, the Fifth Circuit reversed. The co-worker's negligence was imputed to the employer and, "[u]nder the Jones Act, even the slightest negligence suffices for a finding of liability." 507 F.2d at 221.

In *Page*, the issue was whether an employee's negligence could be the sole proximate cause of his injuries when the railroad also was negligent. The Fifth Circuit stated that "ordinarily in FELA cases there is really no place for [sole proximate cause] in the jury submission." 349 F.2d at 826.

Yet, in Petitioner's case, the Fifth Circuit spurned its earlier accurate interpretations of *Rogers* that the "single question [is] whether negligence of the employer played any part, however small," in the injury of which an employee complains. *Rogers,* 352 U.S. at 508. Certainly, once the jury decided the fact question that the railroad was negligent, causation should have followed as a matter of law. But for the railroad's negligence, the Petitioner would not have been crushed between equipment rolling in opposite directions. The district court erred when it denied Petitioner's motion for judgment n.o.v.

The decisions interpreting *Rogers* as merely setting out the test for a jury case must be corrected. As in the instant case, when a jury blatantly ignores a defendant's

negligence which caused injuries to the employee, the plaintiff is entitled to judgment n.o.v. The remaining circuit courts need to be assured that they are properly following the congressional intent behind the FELA and Jones Act.

D. Strict Adherence to a Rogers Jury "Test" Contravenes Congressional Intent and Leads to a Lack of Uniformity in the Application of a Federal Statute.

As stated by this Court, the FELA "was enacted because the Congress was disatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or *in part* to the employer's negligence." *Rogers*, 352 U.S. at 507. When some of this country's federal circuit courts ignore the mandate of Congress, they must be brought back into line. The statute should be interpreted uniformly so as to afford all litigants, regardless of the circuit in which they bring suit, the same opportunity for compensation for injuries caused "in whole or in part" by the railroad's negligence.

III.

BECAUSE THE FIFTH CIRCUIT APPLIED A LOCAL RULE IN A MANNER INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE, PETITIONER DOMINEY HAS BEEN DENIED PROCEDURAL AND SUBSTANTIVE RIGHTS.

Even if this Court determines that the Petitioner cannot claim as a matter of law that the railroad's negligent acts caused his severe injuries (at least in part), justice requires that he be granted a new trial. Either the jury did not understand that the railroad was liable if its negligence was even partially responsible for Petitioner's injuries, or the jury did not follow the charge of the court,

or some outside influence was responsible for its illogical verdict. There were neither probative facts in the evidence nor a reasonable evidentiary basis for the jury's decision. Further, the jury's findings are internally inconsistent, indicating serious error in the process. Petitioner cannot even know whether he received a fair trial because the trial court refused to allow him to interview the jurors in a timely fashion.

A. The Circuits Need This Court's Guidance as to the Proper Relationship Between Local and Federal Rules in the District Courts.

This Court has the power to prescribe the rules of procedure for district courts. 28 U.S.C. §2072. The Court has done so by promulgating the Federal Rules of Civil Procedure. *Hanna v. Plumer*, 380 U.S. 460, 464 (1964). District courts have the authority to formulate their own local rules. Such rules must "be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. §2071. Specifically, Rule 83 of the Federal Rules provides that district courts can make local rules which are "not inconsistent with these rules." Fed. R. Civ. P. 83. The Federal Rule at issue in this case is Rule 59. Rule 59 permits a party to move for a new trial based on affidavits by serving the affidavits with the motion within ten days after the entry of judgment. Fed. R. Civ. P. 59. Section 2071 and Rule 83 must be read in conjunction with Rule 59.

A local rule for the Northern District of Texas prohibits anyone from contacting jurors to obtain affidavits (or for any other reason) without "explicit leave of the Court." Local Rule 8.2(d). On its face, the local rule does not appear to be inconsistent with Rule 59. In Petitioner's case, however, the district court denied the oral motion made as soon as the verdict was read and procras-

tinated in granting the Petitioner's written motion to interview the jurors and obtain the necessary affidavits until twenty-one days after entry of judgment which was eleven days after the expiration of the ten-day period allowed by Rule 59. The district court's untimely ruling effectively denied the Petitioner the very affidavits he needed to support his motion for a new trial under Rule 59. Therefore, the local rule was applied in a manner inconsistent with Rule 59. A local rule which is "consistent" with the Federal Rules under section 2071 and not inconsistent with Rule 83 nevertheless does not remain so if it is inconsistent as applied.

Litigants must have a method for determining whether their case was determined by an impartial jury. The American Bar Association has stated that

> [w]here testimony and affidavits of jurors may be received in support of or against a motion for a new trial, a lawyer, in his obligation to protect his client, must have the tools for ascertaining whether or not grounds for a new trial exist, and it is not unethical for him to talk to and question jurors.

ABA Comm. on Professional Ethics and Grievances, Formal Op. 319 (1967).[5] The district court's application of a local rule deprived Dominey's lawyer of the very tool he needed in order to protect his client.

The Fifth Circuit Court of Appeals summarily dismissed the trial court's error: "Dominey concedes that he never attempted to file any juror affidavits in support of his post-trial motions asserting improper conduct." Appendix 2 (page 2). It would have been pointless for Dominey to obtain affidavits after the expiration of the ten-day period following the entry of judgment allowed under Rule 59. The affidavits were needed to support the motion for a new trial. The ten-day limitation is not

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[5]This Formal Opinion is cited in the Code of Professional Responsibility DR 7-108(d) (1979).

tolled while a trial judge ponders whether to permit counsel to interview jurors. *Howard v. Burlington Northern, Inc.*, 75 F.R.D. 644, 646 (Ore. 1977), *aff'd*, 588 F.2d 842 (9th Cir. 1978).

In fact, the ten-day time period may not be extended and cannot be circumvented for any reason. *Stradley v. Cortez*, 518 F.2d 488, 492 (3d Cir. 1975). For example, in *Bucantis v. Midland-Ross Corp.*, 81 F.R.D. 623, 624 (E.D. Pa. 1979), the petitioner attempted to add a ground in support of his motion for a new trial (counsel had just learned of a new decision) twenty-eight days after the running of the ten-day time limit. The court stated that the additional ground would not be considered because it was not served within the ten-day period. *Id.*

The Fifth Circuit, however, apparently would have litigants obtain affidavits in support of motions for a new trial under Rule 59 which are worthless because of the ten-day time bar. The Court of Appeals suggested that not doing so was a "concession" which is somehow fatal to a petitioner's cause as "prejudicial." Further, the Court of Appeals failed to hold the district court in check because it failed to confront the issue of the district court's application of a local rule, which was inconsistent with a Federal Rule.

The Fifth Circuit is at odds with the Third Circuit. In *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975), a local district court rule empowered the district court to require prior judicial approval of communications between plaintiffs, their attorneys, or third parties, when that communication was for the purpose of encouraging common participation in a lawsuit. *Id.* at 164. The local rule was inconsistent with Rule 23 of the Federal Rules. The Third Circuit Court of Appeals concluded that the

local rule was "outside the power granted to the district court and its enforcement may be prevented." *Id.* at 164.

The Ninth Circuit also has addressed the issue of the propriety of a local rule if it is applied in a manner which is inconsistent with a Federal Rule: The district court cannot give an "effect" to a local rule in such a manner as to be inconsistent with a Federal Rule. *Dredge Corp. v. Penny,* 338 F.2d 456, 461 (9th Cir. 1964). In *Dredge,* the local rule did not specifically allow for a party opposing a motion for summary judgment to apply for oral argument. *Id.* The Court of Appeals interpreted Federal Rule 56(c) as "contemplat[ing] that a hearing will be held." *Id.* Consequently, "a district court may not, by rule or otherwise, preclude a party from requesting oral argument." *Id.* at 462.

The Fifth Circuit's holding in the instant case is contrary to its own holding in *First National Bank v. Small Business Administration,* 429 F.2d 280 (5th Cir. 1970). There, according to local practice, the court instructed the jury and ordered it to retire for deliberations before objections to the charge were heard. This is contrary to Rule 49(a) of the Federal Rules of Civil Procedure. *Id.* at 284-85. The Court of Appeals concluded that such a local "practice" inconsistent with Federal Rule 49(a) was impermissible. *Id.*

The Ninth Circuit's reasoning should be applicable to all cases where a local rule, as applied, is inconsistent with a Federal Rule. The Fifth Circuit's maverick behavior in the instant case threatens "the goal of uniformity of federal procedure posed by the decision below." *Hanna v. Plumer,* 380 U.S. at 463. The court's application of its local rule also denied this Petitioner procedural rights guaranteed by Rule 59.

B. A Constitutional Issue Exists as to Whether a District Court Can Invoke a Local Rule in Such a Way as to Deny a Litigant the Opportunity to Ascertain Whether an Impartial Jury Gave Him a Fair Trial.

The Seventh Amendment guarantees an impartial jury in civil trials. *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981). An impartial jury is crucial to a party in order to obtain a fair trial. *Id.* Further, "on a motion for a new trial . . . a juryman may testify upon the question of the existence of any extraneous influence" which may have led to the denial of a fair trial. *Mattox v. United States*, 146 U.S. 140, 149 (1892).

The jury in Petitioner's trial found that Santa Fe violated its own safety rule in moving the locomotive before Dominey was in the clear, that this violation was negligence, but that that negligence did not cause the injuries Dominey received when the backing locomotive crushed him against the side of the caboose. Liability is predicated upon negligence. The Court of Appeals surmised first that "such negligence did not necessarily contribute to [the] accident." Appendix 1 (page 4). Or, "[t]he jury could have determined fault found on the Railroad's part was solely related to the avoidance of an equipment collision, or that Dominey should not have stepped off the caboose, or that such action or some momentary diversion of Dominey's attention was the sole cause of his being struck by the locomotive." Appendix 1 (page 2). The Court of Appeals refused to consider a third possibility raised by the Petitioner: Juror misconduct could just as easily have been — and in light of common sense most likely was — the reason for the jury's failure to find that the Railroad's negli-

gence caused Dominey's injuries "in whole or in part." Juror misconduct could have denied this Petitioner a fair trial.[6]

In any event, the Court of Appeals should not have engaged in guessing games when there was a procedure for determining whether juror misconduct denied the Petitioner his Constitutional right to a fair trial. If a local rule can prevent review of juror misconduct, the Seventh Amendment no longer protects the rights of citizens to a fair trial.

CONCLUSION.

In the end, the ideal articulated by this Court in *Rogers v. Missouri Pacific R. Co.* says it all. Congress has given railroad employees a substantive right: "The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence." 352 U.S. at 507 (emphasis in Opinion). This Court has acknowledged that it has an "obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Id.* at 509. Substantive rights have no meaning unless all employees like the Petitioner can go to court and obtain the remedy Congress granted in the FELA. The Fifth Circuit's "narrow and niggardly" construction of the Act will erode the rights of all employes covered by the FELA.

Simply put, the Petitioner was permissively standing within a "zone of danger" beside a caboose in which he

---

[6]On voir dire, jury foreman Moore first admitted that he really did not know if he could be a fair and impartial juror in this case because "we move an awful lot of grain by rail." [RT 3] Even though Moore later allowed as how he *thought* he could render a fair verdict, [RT 6], an interview could have determined whether he was involved in any juror misconduct.

had been riding when a co-worker violated a Santa Fe safety rule and negligently directed two locomotives to back onto that same track before the Petitioner and the caboose were clear of the zone of danger. He was crushed between the locomotives and the side of the caboose — his body spun like a pencil being rotated between two hands moving in opposite directions.

The problem here is that the Fifth Circuit (and other circuits) has chosen to misinterpret Congressional intent as construed by this Court. Compounding its error, the Fifth Circuit permitted the district court's roadblock of Petitioner's procedural rights to stand because it refused to find that the application of a local rule in contravention of a Federal Rule of Civil Procedure and the United States Constitution was error. Petitioner thus was denied any opportunity to ascertain whether he received a fair trial.

The equities of this factual situation, the urgent need to clarify the true nature of the *Rogers* test, and the compelling need to instruct the district court on the proper relationship between local rules and the Federal Rules of Civil Procedure, require the intervention of this Court.

Respectfully submitted,

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Nichols, Ballard & Friend,
Fred Misko, Jr.,
W. Page Keeton,
Scott, Douglas & Keeton,
R. Edward Pfiester, Jr.,

Attorneys for Plaintiff-Appellant,
Rodney E. Dominey.

APPENDIX 1.

In the United States Court of Appeals for the Fifth Circuit.

Rodney E. Dominey, Plaintiff-Appellant, versus The Atchison, Topeka & Santa Fe Railway Company, Defendant-Appellee. No. 82-1531 Summary Calendar.

Appeal from the United States District Court for the Northern District of Texas.

DATED: July 25, 1983.

Before GEE, RANDALL and TATE, Circuit Judges.

PER CURIAM:

The plaintiff Dominey, a railroad employee, appeals from judgment dismissing, after jury trial, his suit against his employer railroad under the Federal Employers' Liability Act, 45 U.S.C. §§51 et seq. His sole contention is that the district court erred in denying his motion for judgment notwithstanding the verdict, because reasonable minds could not differ in concluding that the defendant railroad's conduct was a legal cause of the plaintiff Dominey's injury.

The jury found in special interrogatories that the railroad was negligent in directing a locomotive to back up before the caboose in which Dominey was riding was clear of a fouling/clearance point, but it also found that this negligence was not "a legal cause, in whole or in part, of the accident in question."

The accident had occurred when the plaintiff Dominey stepped off a slowly moving caboose and shortly afterwards was struck by a backing locomotive on an adjacent track. The jury also found in answer to a special interrogatory that the defendant railroad had *not* failed to adequately warn the plaintiff Dominey of the backward movement of the locomotive. As a result of its answer to the previous interrogatories, the jury did not reach

and was not required to make findings as to whether the plaintiff was contributorily negligent and as to the respective percentages of negligence of the two parties. No objection is raised on appeal as to the scheme or content of the special interrogatories.

The jury found that the railroad's negligence was not a legal cause of the plaintiff's accident, pursuant to an instruction to which the plaintiff made no objection:

> For purposes of this action, negligence is a legal cause of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from a preponderance of the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damages suffered by the plaintiff, you may find that such injury or damage was legally caused by the defendant's act or omission. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

Under the evidence, instructions, and contentions submitted to the jury, the effect of the jury's finding that the defendant's negligence was not a legal cause, in whole or in part, of the accident was a determination that the employee's negligence was the sole cause of the accident. See Page v. St. Louis Southwestern Railway Company, 349 F.2d 820, 822-24, 824-25 n.12, 827 (5th Cir. 1965), approving the method followed by the present district court of submitting the issues of employer and employee negligence to the jury as consonant with Rogers v. Missouri Pacific Railroad Company, 352 U.S. 442, 506-07, 77 S.Ct. 443, 448-49 (1957).

Without detailing them, there are either probative facts in the evidence or a reasonable evidentiary basis (whatever the test) by which the jury could conclude that the negligence of the railroad in the respect found did not cause or contribute to the accident resulting when Dominey stepped off the caboose and was struck by the backing locomotive on the adjacent track. That is, while (as found by the jury) the locomotive was negligently directed to back up on the siding track before the caboose on the main line had passed the fouling/clearance point (the point at which the caboose and locomotive would brush another, *if* at that time side-by-side on the adjacent tracks; which, then, they were *not*), such negligence did not necessarily contribute to an accident that would occur at a subsequent time if an employee stepped off the caboose and was struck by a backing locomotive (which he had failed to observe) that by then was adjacent to the caboose at a point where the locomotive and the caboose would not strike one another.

Therefore, despite the extremely scholarly and persuasive brief by Dominey on appeal, we are unable to find that the district court erred in denying the plaintiff's motion for judgment notwithstanding the verdict for essentially the reasons set forth in its order of September 7, 1982. Consequently, we AFFIRM the district court's take-nothing judgment entered against the plaintiff.

AFFIRMED.

APPENDIX 2.

In the United States Court of Appeals for the Fifth Circuit.

Rodney E. Dominey, Plaintiff-Appellant, versus The Atchison, Topeka & Santa Fe Railway Company, Defendant-Appellee. No. 82-1531.

Appeal from the United States District Court for the Northern District of Texas.

DATED: March 20, 1984.

Before CLARK, Chief Judge, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

In this Federal Employers Liability Act (FELA) case, Rodney Dominey, a railroad conductor, was injured when struck by the defendant's locomotive during a switching operation. In response to special interrogatories, the jury found by the preponderance of the evidence that the defendant "directed the locomotive to back up before the caboose on which Dominey was riding was clear of the fouling/clearance point,"[1] and that this action was negligence. The jury also found, however, that this negligence was not "a legal cause, in whole or in part, of the accident in question." Judgment was entered for the defendant. Dominey appeals the district court's denial of his alternate motions for judgment notwithstanding the verdict and for a new trial. We affirm.

The record contains probative evidence on the issue of causation under FELA, which required submission to the jury. The trial court properly instructed that "negligence is a legal cause of damage if it played any part, no matter how small, in bringing about or actually

[1]The "fouling/clearance point" or "zone of danger" is the area in the crotch formed by the intersection of a spur and straight track where equipment on the separate tracks is in danger of colliding.

causing the injury or damages." Dominey made no objection to this instruction. Indeed, the language used by the court is legally indistinguishable from that requested by Dominey.

Dominey contends it was impossible for the Railroad's negligence, which the jury found, not to be causative of his injury in some degree. This contention is not well taken. The jury could have determined fault found on the Railroad's part was solely related to avoidance of an equipment collision, or that Dominey should not have stepped off the caboose, or that such action or some momentary diversion of Dominey's attention was the sole cause of his being struck by the locomotive. Causation was a fact issue for the jury. They decided it under a proper charge and that ends the issue for this appeal.

Dominey also contends that the trial court committed reversible error by not granting his motion to interview jurors until the expiration of ten days after entry of judgment.[2] Dominey concedes that he never attempted to file any juror affidavits in support of his post-trial motions asserting improper conduct. He has failed to demonstrate prejudicial error.

For these reasons, the judgment of the trial court is AFFIRMED.

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[2]A local rule of the district court forbade any contact with jurors without court permission.

APPENDIX 3.

Mr. Gilbert Ganacheau, Clerk
Court of Appeals
600 Camp St.
New Orleans, La.

Re: No. 82-1531, Rodney E. Dominey v. The Atchison, T.&S.F. Ry. Co., U.S. Ct. of Appeals (Fifth Circuit)

Dear Sir:

The Court granted leave to list these additional authorities on these subjects:

(1)

The "Impeachment" Testimony of the Witness Hogan

The Court inquired if there was *any* evidence concerning the cigarette lighter which Mr. Dominey was allegedly retrieving. We suggest the testimony suggestive of that fact was from Mr. Hogan, a supervisory employee, who was called and stated that some 4 or 5 months after the accident he was told by Mr. Aydellotte that the latter saw him (or told him) try to pick up a lighter. (p. 1158.) This notwithstanding Aydellotte's statement to the railroad agent *that* day to the contrary.

It was purely "hearsay" and not probative since not under oath.

Rules of Evidence 801(d)(1)(A) [1] and 802, *Garcia v. U.S.*, 530 F.2d 650 (5th Cir. 1976), *United States v. Ragghianti*, 560 F.2d 1376, 1381 (9th Cir. 1977)

Other Authorities on 100% "Sole Cause"

(2)

In addition to *Spinks* and *Reyes*, which we have cited in our briefs, we also cite

Santanna v. United States, 572 F.2d 331 (1st Cir. 1977) — per Ingraham

(3)

On "Proper tests" to be Applied

While we perhaps have not made it as clear as we should have in our primary brief, we have always asked for a new trial or remand, and have made that more clear in our Motion for Rehearing.

The first panel (Judges Gee, Randall and Tate) so understood our position.

We also cited in our argument the recent decision of this Circuit in *Robin v. Wilson Bros.*, 719 F.2d 96 (Oct. 10/83), which clarifies our request on both the "no probative evidence," the law question, and "no reasonable evidentiary basis" to sustain the action of the trial judge in overruling the motion for new trial.

Also, *Robin* and other recent cases in this Circuit, have questioned whether the employee has as heavy a burden to move for a directed verdict as does the employer simply because in *all* cases like this the entire case must be remanded under either test.

We do at least ask the Court to consider the legal and abuse of discretion grounds.

Respectfully,

/s/ W. James Kronzer
W. James Kronzer

cc: Mr. Don Hermann
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Fort Worth, Texas

Office-Supreme Court, U.S.
FILED
JUL 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2109

IN THE

Supreme Court of the United States

October Term, 1983

RODNEY E. DOMINEY,

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,

Respondent.

SUPPLEMENTAL APPENDIX TO THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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In the United States District Court for the Northern District of Texas Fort Worth Division.

Rodney E. Dominey vs. The Atchison, Topeka and Santa Fe Railway Company. Civil Action No. CA 4-80-22-E.

Filed: September 7, 1982.

ORDER.

This action was tried to a jury, with a verdict returned for defendant on September 10, 1981. Plaintiff filed a motion for judgment notwithstanding the verdict, or, in the alternative, motion for a new trial. After careful consideration of the motion, the briefs and the arguments presented at the hearing, the Court makes the following ruling:

I. Applicable Law

A. *Sufficiency of Evidence*

Under the Federal Employers' Liability Act (FELA), findings of negligence and causation are within the province of the jury. The Supreme Court of the United States has established that "[o]nly when there is a *complete* absence of probative facts to support the conclusion" can a jury's determination be disregarded. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (emphasis added). The definitive rule laid down by the Supreme Court is that the jury's conclusion, "whether it relates to negligence, causation or any other factual matter, cannot be ignored." *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944). Thus, if any set of facts or inferences would support the jury's verdict, that verdict must stand.

B. *Intervening Cause*

FELA §3, 45 U.S.C. §53 (1976), provides that an employee's contributory negligence will not bar recovery from a common carrier under FELA. If an employee's act is the *sole* cause of his injury, however, his negligence will preclude recovery. This follows logically, as stated

by Judge John R. Brown, "since a jury, honestly determining that the injured employee's actions were the sole cause of injury, necessarily finds ... that no act of the railroad, *even though found to be negligent,* played any part in bringing about the injury." *Page v. St. Louis Sw. Ry.*, 349 F.2d 820, 827 (5th Cir. 1965) (emphasis added). Again, this question is left for the jury's determination.

II. Jury Instructions

The jury was given proper instructions as to the meaning of negligence and legal cause, Jury Charge, pp. 8-9. It was instructed that negligence would be a "legal cause of damage even though it operates in combination with the act of another ... if the negligence played any part, no matter how small, in causing such damage." Jury Charge, p. 9. This language parallels that of the statute, 45 U.S.C. §51 (1976).

III. Discussion

A. *Questioning the Province of the Jury*

Plaintiff's contentions numbered I through IX each deal with removing certain decisions from the jury. The jury found the defendant negligent in special interrogatories numbers 1 and 3. In each case, of course, the jury *may* have decided the plaintiff's actions were the *sole* cause of any injury. Thus, a lack of causation found by the jury would be proper and logical. "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury ...." *Tennant, supra,* at 35. If plaintiff's injuries were due in *any* part to negligence by the defendant, the jury should have found for the plaintiff, as the instruction quoted above indicates.

In each of the other portions of the jury's verdict there was no negligence found. These findings, as long as supported by some evidence, are totally within the

province of the jury. *See Rogers v. Missouri Pac. Railroad,* 352 U.S. 500, 510 (1957) ("Congress vested the power of decision in these [FELA] actions exclusively in the jury....).

B. *Other Contentions*

Plaintiff contends the jury was guilty of some misconduct. Absent some evidence, this claim has no merit. The exclusion of the evidence mentioned in plaintiff's contention XI, asking a witness for a legal conclusion, was properly excluded. The instruction requesting quotation from the Boiler Inspection Act was unnecessary to charge the jury. The other requested instruction referred to in contention number XII was phrased in the negative, which would tend to confuse a jury. *See Almendarez v. Atchison, Topeka & Santa Fe Ry.,* 426 F.2d 1095, 1097 (5th Cir. 1970).

IV. Conclusion

Based on these points, the Court hereby ORDERS that plaintiff's motion for judgment notwithstanding the verdict or in the alternative plaintiff's motion for new trial is DENIED.

Signed this 7th day of September, 1982.

/s/ ELDON B. MAHON
ELDON B. MAHON

United States District Judge

Office-Supreme Court, U.S.
FILED
JUL 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2109

In The

Supreme Court of the United States

October Term, 1983

RODNEY E. DOMINEY

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In this action under the Federal Employers Liability Act, did the Trial Court correctly submit the issue of causation to the jury.
2. Was the Petitioner denied a procedural or substantive right by application of Rule 8.2(d) of the Local Rules of Practice before the United States District Court for the Northern District of Texas.

STATEMENT OF THE PARTIES

Pursuant to Rule 21.1(b) and Rule 28.1, counsel for Respondent certifies that the following named persons and entities constitute the parties to this proceeding and affiliated companies:

1. Rodney E. Dominey
2. The Atchison, Topeka and Santa Fe Railway Company, a wholly owned subsidiary of Santa Fe Industries, Inc., which is a subsidiary of Sante Fe Southern Pacific Corporation. Other subsidiaries of Santa Fe Industries, Inc. are Sante Fe Pipeline Company, Gulf Central Pipeline Company, the Santa Fe Trail Transportation Company, Santa Fe Energy Company, Santa Fe Mining, Inc., Kirby Forest Industries, Inc., Walker-Kurth Lumber Company, Santa Fe Land Improvement Company, Robert E. McKee, Inc. and the Zia Company.

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No. 83-2109

In The

Supreme Court of the United States

October Term, 1983

RODNEY E. DOMINEY

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, The Atchison, Topeka and Santa Fe Railway Company, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case.

GROUNDS FOR JURISDICTION

The jurisdiction of the United States District Court in which this action was brought was based on 28 U.S.C. § 1291. This Court's jurisdiction is predicated upon 28 U.S.C. § 1254 (1).

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STATEMENT OF THE CASE

This is a Federal Employers Liability Act (FELA) case brought by Petitioner, Rodney E. Dominey (hereinafter called Dominey), for damages claimed to have been sustained when he was struck by a locomotive on November 7, 1979. Trial of the cause commenced in the U.S. District Court for the Northern District of Texas, Fort Worth Division, on August 31, 1981, and was concluded on September 10, 1981. During the two week trial the Court and jury heard evidence from twenty-one witnesses and reviewed thirty-four exhibits. At conclusion of the evidence, the case was submitted to the jury on twenty (20) special issues, many containing subparts, and the jury received over fifteen pages of special instruction from the Court. Based upon the jury responses, the District Court entered judgment that Plaintiff Dominey take nothing from the Defendant.[1]

Dominey's appeal has centered on the following jury finding:

> "QUESTION NO 1:
>
> A. Do you find from a preponderance of the evidence that defendant directed the locomotive to back up before the caboose on which Dominey was riding was clear of the fouling/clearance point?

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[1]A complete copy of the Charge of the Court and Verdict is included in the Appendix to this Brief.

ANSWER:

(✓) Yes

( ) No

If you have answered Part A 'Yes' then answer Part B; otherwise, proceed to Question No. 2.

B. Do you find from a preponderance of the evidence that such action was negligence?

ANSWER:

(✓) Yes

( ) No

If you have answered Part B 'Yes' then answer Part C; otherwise proceed to Question No. 2.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

( ) Yes

(✓) No"

As shown in the Appendix to this Brief, the District Court also submitted Dominey's requested jury issues concerning claims of negligence by Respondent in: (1) failing to stop the backward movement of the locomotive units when the person giving the back-up signal disappeared from view, (2) failing to provide an adequate and functioning radio on the locomotive, (3) failing to sound the locomotive whistle before beginning the backing movement, (4) failing to adequately warn Dominey of the backward movement of the locomotive, (5) failing to adequately bleed the caboose air system and inspect the hand brakes to insure that the caboose would roll freely during the dropping movement, and (6) failing to provide Dominey with a reasonably safe place to work. Finally, the

issues requested by Dominey and submitted by the Court also inquired whether Respondent violated the Boiler Inspection Act[2] by operating a locomotive that was smoking or had an inoperative radio, and whether Respondent violated the Safety Appliance Act[3] by failing to maintain the brakes on the caboose.

The jury found Dominey's injuries not to have resulted " . . . in any part, no matter how small, . . . "[4] from negligence or breach of duty by Respondent.

The issues contained in the verdict were conditioned so that the jury was not required to answer questions concerning damages and Dominey's contributory negligence, absent findings of negligence and causation or violation of duty by the Respondent. Thus, the last 10 issues were left unanswered.

The jury verdict was returned and received by the Court on September 10, 1981 and the judgment was signed on September 14, 1981. Counsel for Dominey made an oral motion to interview jurors, which the Court denied without prejudice to Dominey's right to file a written motion in compliance with local court rules. Dominey filed his written motion on September 28, 1981, and it was granted on September 30, 1981. On September 24, 1981, Dominey had filed a Motion of Judgment Notwithstanding the Verdict or in the alternative Motion for New Trial on September 24, 1981. This Motion remained pending until September 7, 1982, when it was denied.

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[2]Boiler Inspection Act, 45 U.S.C.A. §§ 22-34 (West 1972).

[3]Safety Appliance Act, 45 U.S.C.A. §§ 1-16 (West 1972).

[4]Charge of the Court, page 9 (Appendix).

Dominey appealed the decision to the Fifth Circuit Court of Appeals. The case was placed on the summary calendar and on July 25, 1983 the Fifth Circuit issued an unpublished opinion affirming the Trial Court.[5] Dominey filed a Motion for Rehearing which was granted. Following oral argument on March 19, 1984, a second unpublished opinion dated March 20, 1984, was issued, again affirming the trial court.[6]

STATEMENT OF FACTS

Dominey was injured when he stepped from a caboose into the path of a locomotive while he and other members of his train crew were involved in a "drop movement." The Petition for Writ of Certiorari suggests that the drop movement was made because the locomotive was smoking, that the drop movement was necessary in the absence of a turntable, and that Dominey stepped off of the caboose during the drop movement because the caboose was slowing down and he wanted to ascertain why the caboose was moving so slowly. These same contentions were made at trial, but in each instance were rejected by the jury.[7]

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[5]A copy of the complete Opinion is included as part 1 to the Appendix of Petitioner's Brief.

[6]A copy of the complete Opinion is included as part 2 to the Appendix of Petitioner's Brief.

[7]The competing testimony offered by Respondent and apparently believed by the jury, indicated that: (a) this crew regularly switched the position of the caboose and locomotives by a drop movement irrespective of smoke in a locomotive,

(Continued on next page)

Dominey's complaints on appeal have centered around the jury's negative finding to subpart C of special issue Question No. 1, quoted above.[8] To understand this finding by the jury in Question No. 1, it is important for the Court to understand a drop movement. Dominey was the conductor in charge of a train crew that regularly traveled from Hamlin, Texas to Maryneal, Texas, and back on a daily basis for the purpose of moving freight cars between those points. On the date in question, the crew had arrived at Maryneal and was about to start their return trip to Hamlin with two locomotives and a caboose. The locomotives were positioned back-to-back so that the forward end of the lead locomotive pointed south and the forward end of the second locomotive pointed north.[9] Upon arrival at Maryneal, the two locomotives were in front of or south of the caboose. Since the return movement to Hamlin was to be northward, the position of the locomotives relative to the caboose had to be reversed. There were several ways to do this but a common way and the one selected by Dominey was to make a drop movement.[10] In making the

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(Continued from previous page)

(b) the position of the locomotives could be changed in another way, (c) the caboose had not slowed down but was rolling free when Dominey stepped off the caboose, (d) there was no reason for Dominey to get off the caboose, (e) the engine and caboose did not collide, and (f) Dominey had gotten off the caboose because he dropped a cigarette lighter.

[8]The complaint regarding inability to obtain juror affidavits did not surface until the Motion for Rehearing was filed in the Fifth Circuit and is fully discussed later in this Brief.

[9]Railroad locomotives may travel in either a "forward" or "reverse" position with the same efficiency.

[10]As conductor, Dominey was in charge of the train crew and movement. It was his responsibility to direct the manner in which the movement was made.

drop movement, the locomotives with the caboose attached were placed on the main line to the north of a switch to a siding track which runs off of the main line. The locomotives and caboose were moved southward toward the switch until the speed reached 10 to 12 miles per hour. The locomotives were then slowed so that Dominey, who was on a platform between the caboose and the northernmost locomotive, could pull a "pin" which caused the locomotives and the caboose to uncouple and become separated. Another member of the crew, Mr. Aydellote, was located at a switch near the siding and he aligned the switch so that the locomotives, after separating from the caboose, pulled away from the caboose and moved into the siding track.

After separation from the locomotives, the caboose rolled freely to the south. Once the locomotives were on the siding, and before the caboose arrived at the siding switch, Mr. Aydellote aligned the switch so that the caboose would pass the siding and continue to roll south on the main line.

Had Dominey not stepped off the caboose and been injured, it would have been his job to stop the free rolling caboose with the hand brake. The locomotives would then have been pulled off the siding onto the main line at a position north of the caboose and then reconnected to the caboose. Thus, the locomotives would have been located in front of the caboose on the northbound return trip to Hamlin. Also, a result of the drop movement is that the trailing locomotive on the southbound movement would become the lead locomotive on the northbound movement.

In response to Question No. 1 the jury found that Mr. Aydellote directed the backward movement of the locomo-

tive before the caboose was "clear of the fouling/clearance point" and that this act was negligence. Railroad equipment overhangs the tracks, and the fouling/clearance point was that point south of the switch where a car on the siding track and a car on the main line could pass each other without colliding. The evidence indicated that if adjoining tracks are closer than four feet, the cars or locomotives on those tracks will collide. A trial exhibit[11] showed the siding track used for this drop movement was closer than four feet to the main line for some distance south of the switch, and this obviously must occur since the siding track actually connects with the main line.

Dominey chooses to refer to the V-shaped area between the switch and clearance point as the "zone of danger."[12] This area has nothing to do with a danger zone for employees. Because railroad equipment overhangs the tracks, an accident of this type can occur at any location where an employee carelessly places himself within a certain distance of the track and fails to watch for moving equipment.

The evidence showed that the fouling/clearance point is established in order to prevent the collision of equipment on adjoining tracks. In this instance, the locomotives and caboose did not collide. Had Dominey simply stayed on the caboose, which was his job, no accident would have occurred despite the negligence of Respondent in backing the locomotive. However, for whatever reason (of which several were in evidence), Dominey left the caboose and the injury resulted.

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[11]Exhibit C to Exhibits Lodged to Accompanying Petition for Writ of Certiorari.

[12]Page 7 of Petition for Writ of Certiorari.

ARGUMENT AND AUTHORITIES

In support of his Petition, Dominey argues that the Fifth Circuit and Trial Court misunderstood and misapplied the clear, long-established rules of law applicable to F.E.L.A. actions. He also suggests that a local rule of practice operated to deny him the right to interview jurors.

Respondent submits that Dominey's arguments are without support in the applicable authorities or foundation in the record, and his Petition is merely a request that this Court substitute its judgment for that of the duly empaneled jury.

A. There Is No Conflict Between Circuits In Application Of The Rogers Test.

Dominey's first suggested reason for granting of Writ of Certiorari is that a conflict exists among the circuit courts in application of the "test" of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). Respondent's careful review of the Petition and authorities therein cited does not reveal any such conflict.

In *Rogers,* this Court clearly and succinctly stated the test of liability in FELA actions to be " . . . whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506. This language construes that of 45 U.S.C.A. §§ 51-60 (West 1972), which provides for liability for injury or death " . . . resulting in whole or in part from the negligence . . ." of the employer.

There can be no doubt that the statutory language and the *Rogers* test create a liberal framework for recovery by railroad employees. However, it is equally clear that the employer is not made an insurer, and under prevailing authorities the FELA plaintiff must establish a prima facie case on the same elements found in a common law negligence action. *Richardson v. Missouri, Pacific Railroad Co.*, 577 F.2d 663 (8th Cir. 1982); *Davis v. Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir.) *cert. denied* 429 U.S. 1001 (1976). The proximate cause test is not applied and some aspects of the common law defenses have been abrogated by the FELA; but, neither this Court nor any other federal court has suggested that the issues of negligence and causation are not separate, distinct and necessary elements of an FELA action. *Rogers, supra; Stinson v. Atlantic Coast Line Railroad Co.*, 355 U.S. 62 (1957); *Arnold v. Panhandle & Santa Fe Railway Co.*, 353 U.S. 360 (1957); *Harrison v. Missouri Pacific Railroad Co.*, 372 U.S. 248 (1963); *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963).

Since *Rogers*, this Court has demonstrated an unwavering disposition to reverse lower courts if issues of negligence or causation are taken from a jury in an FELA case.[13] In *Basham v. Pennsylvania Railroad Co.*, 372 U.S.

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[13]*Gallick, supra; Basham v. Pennsylvania Railroad Co.*, 372 U.S. 699 (1963); *Stinson, supra; Gibson v. Thompson*, 355 U.S. 18 (1957); *Ringhiser v. Chesapeake & Ohio Railway Co.*, 354 U.S. 901 (1957); *Thompson v. Texas & Pacific Railway Co.*, 353 U.S. 926 (1957); *Moore v. Terminal Railroad Association*, 358 U.S. 31 (1958); *Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15 (1959); *Davis v. Virginian Railway Co.*, 361 U.S. 354 (1960); *Dennis v. Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208 (1963); *Davis v. Baltimore & Ohio Railroad Co.*, 379 U.S. 671 (1965).

699 (1963) a jury verdict was returned for the railroad employee, but the trial court set aside the jury verdict, concluding there was no negligence as a matter of law. Reversing the trial court's decision, this Court held:

> "Since, in this case, petitioner's evidence, though disputed, constituted probative facts sufficient to support the finding of negligence, the state courts improperly invaded the function and province of the jury in setting the verdict aside."

Id. at 701.

In *Gallick, supra,* this Court reaffirmed that the issue of causation in an FELA action is one properly submitted to the jury. There, a railroad employee brought an FELA action in state court alleging injury caused by an insect bite while on the job. On return of special issues from the jury, the trial court entered judgment for the employee. The state appellate court reversed the trial court and entered judgment for the railroad, finding as a matter of law that no causation had been established. On writ of certiorari, this Court began its analysis by a review of its previous decisions affirming the role of the jury in any determination of causation in FELA actions.[14] After a brief review of the probative evidence presented at trial, this Court reversed the lower court and held:

> "The facts before the jury fall within the [Rogers] standard and the Court of Appeals therefore erred in refusing to accept the jury's verdict."

Id. at 116.

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[14]*See: Tennant v. Peoria & P.U.R. Co.,* 321 U.S. 29 (1944); *Schulz v. Pennsylvania R. Co.,* 350 U.S. 523 (1956); *Lavender v. Kurn,* 327 U.S. 645 (1946).

Upon review of *Rogers* and subsequent authority, it would be difficult to imagine how this Court could give more clear and precise direction with respect to the jury issues and fact finder's role in FELA actions, and the circuit courts have had no difficulty understanding and applying the *Rogers* test without conflict.

B. Petitioner Has Cited No Authority To Support Determination Of Causation As A Matter Of Law.

In his Petition, Dominey suggests that the cases of *Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 329 (1951), *Eckenrode v. Pennsylvania Railroad Co.*, 335 U.S. 573 (1951) and *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943) approve determination of the causation issue as a matter of law. However, each of these cases was decided before the *Rogers* decision, which clearly enunciated the standard for a jury case, and a careful review of *Moore, Eckenrode* and *Brady* indicates that this Court did not then apply a standard for sufficiency of the evidence similar to that of *Rogers*. Under *Rogers*, only a complete absence of probative facts will allow the trial court to determine a fact question as a matter of law in an FELA action. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). It is difficult to believe that the *Moore, Eckenrode* and *Brady* cases would today be decided in a similar manner.

Respondent sharply disagrees with Dominey's interpretation of *Santana v. United States*, 572 F.2d 331 (1st Cir. 1977) and *Peymann v. Perini Corp.*, 507 F.2d 1318 (1st Cir. 1974) *cert. denied*, 421 U.S. 914 (1975). These cases do not suggest that the causation issue should be withheld from the jury, and Respondent strongly urges this Court to examine these cases carefully.

Santana, supra, was a Jones Act case tried to the court without a jury where the plaintiff was denied relief. The trial judge erroneously applied the "proximate cause" standard instead of the FELA standard. As a result of this error, the appellate court simply reversed for a new trial on all issues. The Circuit Court did not find causation as a matter of law.

Dominey's reliance on *Peymann, supra,* is also misplaced. The discussion from which Dominey drew the language quoted on page 14 of his Petition concerned the distinction between requiring a "sole, efficient, producing cause" under common law negligence and the lesser requirement of showing a "contributing cause" under the Jones Act. *Peymann* simply concludes that the negligence of the defendant need not be the sole cause of the injury, only a contributing cause. It does not suggest that causation be eliminated as an element or removed from jury consideration.

C. The Decision In This Case Is Totally Consistent With Previous Fifth Circuit Decisions.

Finally, Dominey suggests in his Petition that the Fifth Circuit has ignored its own precedent. He asserts that the Fifth Circuit has determined in a number of decisions that causation is not a fact issue and that the finding of negligence alone is sufficient to establish liability. In support of this position, Dominey cites *Reyes v. Vantage Steamship Co.,* 558 F.2d 238 (5th Cir. 1977); *Spinks v. Chevron Oil Co.,* 507 F.2d 216 (5th Cir. 1975); and *Page v. St. Louis Southwestern Railway Co.,* 349 F.2d 820 (5th Cir. 1965). None of these cases supports Dominey's proposition that negligence and causation should be merged.

With respect to *Reyes, supra,* which was tried to the Court without jury intervention, Dominey has failed to note that motion for rehearing was granted and a second opinion issued. *Reyes v. Vantage Steamship Co.,* 609 F.2d 140 (5th Cir. 1980). In its opinion following rehearing, the Fifth Circuit specifically reversed its previous determination of causation as a matter of law and remanded that issue for proper determination by the trial court. Thus, the final decision of that case is contrary to Dominey's position.

Similarly, the *Spinks* and *Page* decisions also confirm that the issue of causation is a distinct fact element that the plaintiff must prove to succeed in an FELA action. These cases discuss the test applicable to motions for directed verdict, but do not suggest that causation is inappropriate for jury determination.

D. The Issue of Causation Was Properly Submitted To The Jury And There Was Sufficient Evidence To Support The Jury Finding Of No Cause.

There was no error in the form of the special issues and instructions given to the jury. In fact, the special issues and instructions were practically indistinguishable from those submitted by Dominey to the Trial Court. At trial Dominey made no objection to the form of the issues and instructions or their submission to the jury. The Fifth Circuit specifically acknowledged the correctness of the issues and instructions in both opinions rendered in this case. The Petition for Writ of Certiorari states no complaint about the form of the issues or instructions. Only

after receiving an adverse answer did Dominey feel aggrieved by submission of this issue to the jury.[15]

It is clear from the record that there was sufficient probative evidence to support the jury's determination that negligence in backing the train before the caboose reached the fouling/clearance point was not a cause, in whole or part, of Dominey's injury. Many of the facts contained in the record are set forth in footnote 7 to Respondent's Statement of Facts.

The jury's answer is further explained by the trial testimony of Mr. Aydellote, the crew member who operated the siding switch during the drop movement. Mr. Aydellote stated that he signalled for the backward movement of the locomotive before the caboose reached the clearance point and acknowledged that this violated Respondent's company rule 118-A. However, he also stated that he knew from experience that the caboose would roll beyond the clearance point before the locomotive reached that point. Since there was no collision of equipment, Mr. Aydellote's experience proved to be correct.

From this evidence the jury concluded that it was negligence to move the locomotives in violation of the company rule, but the jury did not feel that such was a cause

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[15]At trial, Dominey affirmatively took the position that causation was a jury issue. Dominey tendered a brief entitled "Legal Brief Regarding Causation Under the FELA and the Federal Safety Appliance and Boiler Inspection Acts," in which he concluded:

> "The question of whether or not the alleged violation of the Federal Employer's Liability Act played any part, no matter how slight, in causing plaintiff's injuries and damages in this case should be a question to be determined by the properly instructed Trier of Fact, the Jury herein."

of the injury. The obvious and reasonable inference is that the jury felt the locomotive should not have been moved because of danger of collision with the caboose—not because there was danger of striking Dominey, who for whatever reason decided to step off the caboose at that point.

The Fifth Circuit was clearly persuaded by this evidence. The opinion rendered following rehearing states:

> "The record contains probative evidence on the issue of causation under FELA. . . . . The jury could have determined fault found on the railroad's part was solely related to avoidance of an equipment collision, or that Dominey should not have stepped off the caboose, or that such action or some momentary diversion of Dominey's attention was the sole cause of his being struck by the locomotive. Causation was a fact issue for the jury. They decided it under a proper charge that ends the issue on appeal."

The Fifth Circuit's reference to Dominey's conduct as being the "sole cause" of the accident is also well supported in the record.[16] With more than sufficient proba-

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[16]The evidence which supports the findings of sole cause includes testimony that Dominey was in charge of this crew, that he was the one to decide how the locomotives and caboose were to be reversed, that the caboose should have been dropped onto the siding rather than on the main line so that the engineer who sits on the right side of the locomotive could see the caboose at all times, that Dominey knew that the locomotives would be making the backward movement, that Dominey could easily have seen that the locomotives were moving if he had looked, that Dominey could have gotten off of the caboose on the opposite side away from the locomotives if he really needed to get off of the caboose, that all air had been released from the air brake system in the caboose so that Dominey could do nothing by getting on the ground even if the caboose was slowing down, and that he got off of the caboose because he dropped a lighter.

tive evidence on record, the jury properly found sole cause in this action by its refusal to find legal cause. *Page, supra.*

Reduced to its essence, Part I of Dominey's Petition for Writ of Certiorari is no more than a request that this Court review fact issues and substitute its judgment for that of the jury. Of course, this is contrary to the recognized functions of court and jury, which were explained in *Gallick, supra,* as follows:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra, 68; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

The District Court and Fifth Circuit, by refusing to disturb the jury finding in this case, have correctly followed this Court's direction.

E. The District Court Did Not Apply a Local Rule In A Manner Inconsistent With The Federal Rules Of Civil Procedure And Petitioner Has Not Been Denied A Procedural Or Substantive Right.

As a second reason for granting Writ of Certiorari, Dominey suggests that the District Court applied its local rules in a manner inconsistent with the Seventh Amendment and the Federal Rules of Civil Procedure. He asserts that Rule 8.2(d) of the Local Rules of Practice before the U. S. District Court for the Northern District of Texas operated in this instance to deny him the opportunity to obtain juror affidavits in support of his Motion for New Trial.

Briefly restated, the record shows that counsel for Dominey, following return of the adverse jury verdict, made an oral motion for permission to interview jurors. The Trial Court denied the oral motion, but did so without prejudice to Dominey's right to file a written motion in compliance with local practice. Counsel for Dominey subsequently filed the appropriate written motion and also filed a timely Motion for New Trial founded, in part, upon a claim of jury misconduct. The Trial Court *granted* Dominey's motion to interview jurors. However, Dominey made no attempt to conduct interviews or obtain affidavits from the jurors even though the Motion for New Trial remained pending for almost a full year.[17]

Thus, Dominey has totally failed to substantiate any claim of jury misconduct, and his counsel asks for this

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[17]Dominey's motion to interview jurors was granted on September 30, 1981, and his Motion for New Trial was not denied until September 7, 1982.

Court to infer misconduct from the mere fact that Dominey suffered an adverse verdict. The Fifth Circuit correctly refused to engage in such speculation, noting at page 2 of its second opinion:

> "Dominey conceded that he never attempted to file juror affidavits in support of his post-trial motions asserting improper conduct. He has failed to demonstrate prejudicial error."

On Petition to this Court, Dominey suggests the Fifth Circuit is in error because any affidavits he obtained would have been "worthless." He bluntly states that ". . . the ten day period [of Rule 59] may not be extended and cannot be circumvented for any reason."

Dominey's position in this respect is plainly wrong. Rule 59 of the Federal Rules of Civil Procedure states in its pertinent parts:

> "(b) Time for Motion. A motion for new trial shall be served not later than ten days after entry of judgment.
>
> (c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits, they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits."

However, the foregoing provisions must be read in conjunction with Rule 6(b) of the Federal Rules of Civil Procedure, which governs the enlargement of time periods under all Federal Rules of Civil Procedure. Rule 6(b) states:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specific time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was a result of excusable neglect; but it may not extend the time for taking any action under Rule 50(b) and (c) (2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent that under conditions stated in them."

Rule 6(b) specifically prohibits extensions of time under subsections (b), (d) and (e) of Rule 59, but pointedly excludes reference to subsection (c), which pertains to the filing of affidavits in support of a motion for new trial. Therefore, the time for filing for affidavits can be extended under the general requirements of Rule 6(b).

The Advisory Committee's comments to Rule 6 explain why extensions of time to file affidavits in support of a new trial should be permitted. The reason for the specific prohibitions against extensions of time in Rule 59 subsections (b), (d) and (e) is the protection of finality of judgments. However, once a proper motion for new trial is made, the judgment is not subject to time limits of F.R.A.P. 4 until that motion is overruled. Thus, an extension of time to file affidavits does not disturb the finality of the judgment, and does not conflict with the purpose of Rule 6(b). *In accord;* 6 Moore's *Federal Practice* 59.10 (2d Ed. 1953).

A review of the limited case law on this point finds support for the foregoing interpretation of the applicable Rules. In *Kleinschmidt v. United States,* 146 F.Supp. 253 (D.C. Mass. 1956) the court considered the question of late affidavits filed in support of a motion for new trial. Recognizing the proper procedure for movant under Rule 6, the court stated:

> "In my opinion where the record does not already contain the matters upon which the moving party relies, [affidavits] should be filed with the motion, *at least in the absence of an extension of time under Rule 6(b),* not here obtained." (Emphasis added.)

Id. at 256, 257.

Despite the moving party's neglect in requesting an extension of time, the court concluded:

> "However, in this instance, I will regard [moving party's] neglect as excusable, and accept a late submission of affidavits tendered since the hearing."

Id. at 257.

The authorities cited by Petitioner Dominey do not address Rules 59(c) and 6(b), and do not support his position on this issue. In *Howard v. Burlington Northern, Inc.,* 75 FRD 644 (Ore. 1977), *aff'd* 588 F.2d 842 (9th Cir. 1978), the Court upheld the ten day time period in 59(b) with regard to the filing of an original motion for new trial, not the filing of affidavits in support thereof under 59(c). In *Stradley v. Cortez,* 518 F.2d 488 (3d Cir. 1975), the court upheld the ten day period under Rule 59(e) with regard to filing a motion to alter or amend judgment, not the filing of affidavits in support of motion for new trial under Rule 59(c). In *Bucantis v. Midland-Ross Corp.,*

81 FRD 623 (E.D. Pa. 1979), the court upheld the ten day time period with regard to raising new grounds for support of a motion for new trial. However, since Dominey had properly raised the issue of jury misconduct in his original motion for new trial, this case is immaterial to the issue presented.

Finally, and in conclusion on this point, Respondent submits that Dominey has failed to preserve his right to complain of the trial court's action, even if he actually were denied some right. Interestingly, on appeal to the Fifth Circuit, the Appellant's Brief did not even intimate that the Trial Court's action had deprived Dominey of the right to obtain juror affidavits. Petitioner first raised this question in his Petition for Rehearing to the Fifth Circuit. Nowhere in Appellant's Brief to the Fifth Circuit is there any mention of juror misconduct or the application of Local Rule 8.2(d). It has long been the law that appellate courts would not consider new issues raised for the first time in a Petition for Rehearing. *Vaz Borralho v. Keydril Co.*, 710 F.2d 207 (5th Cir. 1983); *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285 (8th Cir. 1977); *In re: Sugar Industry Antitrust Litigation*, 579 F.2d 13 (3rd Cir. 1978); *Bullock v. Mumford*, 509 F.2d 384 (D.C. Cir. 1975).

In summary, if Dominey has been denied an opportunity to show jury misconduct, that denial is purely the result of his unexplained failure to obtain and submit affidavits. The District Court expressly granted Dominey the opportunity to interview jurors, and the District Court had discretion to consider and act upon any such affidavits. The failure of Dominey to pursue this opportunity cannot be a basis for holding the District Court in error.

CONCLUSION

The Petition for Writ of Certiorari filed on behalf of Dominey presents the rare argument by a railroad employee that a fact issue in an FELA case should have been removed from jury consideration. The argument is contrary to his position at trial, where he specifically requested that the Trial Court submit the issue of legal cause to the jury and did not object to issues or instructions given by the Trial Court. The argument is also contrary to every pertinent authority decided by this Court since the landmark case of *Rogers, supra.* The Petition also suggests that a local rule of practice prohibited Dominey from obtaining and filing juror affidavits in support of his motion for new trial, but the record and applicable rules show Dominey was afforded ample opportunity to obtain the affidavits, and simply failed to do so.

Dominey has failed to show any error on the part of the Trial Court or the Fifth Circuit and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

CIVIL ACTION NO. CA 4-80-22-E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RODNEY E. DOMINEY

vs.

THE ATHISON, TOPEKA & SANTA FE RAILWAY COMPANY

CHARGE OF THE COURT AND VERDICT

(Filed September 9, 1981)

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

At the outset, I am sure you understand by this time that all parties to this litigation, whether individual or corporation, or whatever their character, must be treated exactly alike insofar as their rights are concerned. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons; all persons, including corporations stand equal before the law, and are to be dealt with as equals in a court of justice. You should not have any personal feelings or preferences as between individuals and corporations.

A corporation may only act through natural persons, who are known as its agents. In general, any agent or representative of a corporation possessing adequate authority may bind the corporation by his acts, declarations and omissions.

Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations, and do not speculate on matters not shown by the evidence. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case. You will carefully and impartially consider all the evidence in the case, follow

the law as stated by the Court, and reach a just verdict, regardless of the consequences.

This case is submitted to you on special issues, propounded to you in the form of questions, which you will answer from a preponderance of the evidence submitted to you under the rulings of the Court, answering the questions by unanimous consent of the jury through your foreman and writing your answers in the space provided therefor following each question. It is necessary that the jury be advised of, and understand, certain legal terms which play such a large part in the determination of this sort of litigation, so at the outset, I will give you some definitions and explanations.

In a civil action such as this the burden is on the plaintiff to prove every essential element of his case by the preponderance of the evidence. If the proof should fail to establish any essential element of plaintiffs' claim by a preponderance of the evidence of the case, the jury should find for the defendant.

By the term "preponderance of the evidence", as used in this charge, is meant the greater weight or degree of credible evidence in the case. To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more true than not true. It does not necessarily mean the greater volume of evidence or the greater number of witnesses, but it means that when you sift from all the evidence of this case that which you consider credible

or worthy of belief, you take the evidence on each side and the side that has greater weight, that tips the scale, that is the one that preponderates. In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witness, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them. So, the preponderance of the evidence merely means the greater weight or degree of the credible testimony.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an

uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

In the final analysis, it is the responsibility of the jury to make its own independent decision as to ultimate facts in this case and to reach that opinion based on all of the evidence, regardless of the source from which it came.

There are two types of evidence that may be introduced as to the facts of a case. One is direct evidence,

such as the testimony of an eyewitness; the other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. A fact is established by circumstantial evidence when the fact sought to be established may be fairly and reasonably inferred from all other facts and circumstances proved in the case. In order to establish a theory, conclusion or hypothesis by circumstantial evidence, the proved facts and circumstances must be such as to make that theory, conclusion or hypothesis more probable, not merely possible, than any other theory, conclusion, or hypothesis based upon those facts and circumstances. In other words, the fact to be proved is established as an inference from proven circumstances. A fact is established by circumstantial evidence only if its existence is more probable than any other fact that can be reasonably inferred from all of such evidence.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all of the evidence in the case, both direct and circumstantial. In other words, the finding of a fact cannot be based on mere surmise or speculation.

In this case the plaintiff's claims are asserted under the Federal Employers Liability Act, the Federal Safety Appliance Act, and the Federal Boiler Inspection Act.

The Federal Employers Liability Act provides in part that:

> "Every common carrier by railroad while engaged in commerce between any of the several states . . . shall be liable in damages to any person suffering injury—while he is employed by such carrier in such

commerce . . . for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

In this case the plaintiff claims that the defendant was negligent by failing to provide plaintiff with a reasonably safe place within which to work and by failing to provide plaintiff with reasonably safe equipment. Specifically, plaintiff claims that defendant was negligent by:

1. failing to adequately and properly inspect and maintain the engines, caboose brakes, and braking system;

2. failing to warn plaintiff of the dangers involved therein;

3. failing to provide adequate and functioning radios;

4. failing to adequately and properly inspect and maintain the toepath in said area, permitting said toepath to be in a dangerous condition and creating a danger to persons working in said area, including plaintiff herein;

5. failing to warn plaintiff of the dangers involved with said toepath;

6. failing to follow and observe the Santa Fe's operating rules regarding the backing up of locomotive units;

7. failing to provide sufficient instruction, supervision and help to plaintiff and others of its employees at the time of the subject accident.

In order to prevail on this claim the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. that the defendant was "negligent" as claimed by the plaintiff; and

2. that such negligence was a "legal cause" of damage sustained by the plaintiff.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in *doing* something that a reasonably careful person would *not* do under like circumstances, or in *failing* to do something that a reasonably careful person *would* do under like circumstances.

In applying this definition of negligence to the following issues, you are instructed that reasonable foreseeability of harm is an essential ingredient of negligence in a Federal Employers Liability Act case. Defendant's duties are measured by what is reasonably foreseeable under the circumstances, and by what in the light of the facts then shown, should reasonably have been anticipated.

To put it another way, as the danger that should reasonably be foreseen increases, so the amount of care required by law also increases.

You are further instructed that the mere happening of an accident causing an injury to plaintiff does not make defendant liable nor does it raise any presumption of negligence on the part of defendant. The law recognizes what may be called unavoidable accidents. These are accidents which occur through the fault of no one.

Furthermore, the Federal Employers Liability Act does not make the employer the insurer of the safety of its employees while they are on duty. Also, the Act does

not require the absolute elimination of all danger. The extent of the employer's duty is to exercise ordinary care under the circumstances to see that the place in which the work of the employee is to be performed is reasonably safe under the circumstances shown by the evidence in this case and to see to it that the equipment furnished is reasonably safe under the circumstances shown by the evidence in this case.

For purposes of this action, negligence is a *legal cause* of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from a preponderance of the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damages suffered by the plaintiff, you may find that such injury or damage was legally caused by the defendant's act or omission. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

You are instructed for the purposes of this action, the negligence of defendant, if any, would consist of negligent conduct on the part of any of its officers, agents or employees, other than the plaintiff, done within the scope of such person's authority.

It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of such person's authority. Conduct is within the scope of his authority if it occurs while he is engaged in the duties which he was employed to perform

and relates to those duties. Conduct for the benefit of the principal which is incidental to, customarily connected with, or reasonably necessary for the performance of an authorized act is within the scope of authority of an officer, agent or employee. Therefore, if you find from the evidence that plaintiff, while employed for the defendant railroad, a corporation, sustained an injury as a result of the negligence of defendant *or* he sustained an injury as a result of the negligence of one of his fellow employees, acting in the course and scope of his employment, then your verdict must be for the plaintiff and against the defendant.

You are instructed that *reasonably safe place to work* means such a place as an ordinary prudent railroad would have furnished its employees under the same or similar circumstances. The amount of caution required by that duty varies in direct proportion to the dangers known to be involved in the work.

To put the matter in another way, the amount of caution required of a railroad company, in the exercise of ordinary care, to furnish its employees with a reasonably safe place within which to work, increases or decreases as do the dangers known to exist or that reasonably should be apprehended. In connection with such issue, you are further instructed that a railroad is not negligent in failing to furnish a reasonably safe place to work unless the railroad knew, or in the exercise of reasonable care should have known, that the said unsafe condition existed and that the railroad knew, or in the exercise of reasonable care should have known, that the unsafe condition gave rise to an unreasonable risk of harm to its employees.

In the absence of knowledge or notice to the contrary and in the absence of circumstances that caution him or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised ordinary care in furnishing a reasonably safe place within which to work, and he may rely and act on that assumption.

The duty to furnish a reasonably safe place to work is a non-delegable duty. *Non-delegable* as used in this instruction, means that where, as in this case, there is a duty required of an employer to provide a reasonably safe place to work for its employees, that duty and responsibility may not be transferred in any manner or in any degree to anyone else so as to relieve that employer of that duty.

An employer, such as the defendant in this case, has a duty to use ordinary care to provide employees with *reasonably safe equipment* with which to do their work.

However, the employer is not required to furnish the latest, best and safest tools, machinery or appliances, or to discard standard tools, machinery or appliances upon the discovery of later developments. Neither is there any duty on the employer to anticipate the misuse of equipment nor to guard against the consequences of misuse.

You are instructed that a railroad is not negligent in failing to furnish reasonably safe equipment unless the railroad either knew or in the exercise of reasonable care should have known, that the equipment was unsafe and that the railroad knew or in the exercise of reasonable care should have known, that the unsafe equipment gave rise to an unreasonable risk of harm to its employees.

Defendant denies in whole plaintiff's claims under the F.E.L.A. Therefore, if a preponderance of the evidence does not support the plaintiff's claim under the F.E.L.A. for negligence, then on that claim your verdict should be for the defendant. If, however, a preponderance of the evidence does not support the plaintiff's F.E.L.A. claim, you will then consider the defense to plaintiff's F.E.L.A. claim raised by the defendant.

The defendant contends that the plaintiff was himself negligent and that such negligence was legal cause of his own injury. Specifically, defendant claims that plaintiff was negligent by:

1. failing to keep a proper lookout for his own safety.

2. failing to look at the engines before stepping off of the caboose.

3. failing to determine that the engines in question had started moving back to the north.

4. failing to notify other members of the crew that the caboose was not rolling free.

5. pulling the pin between the engine and caboose while standing on the caboose.

6. dropping the caboose on the main line.

7. failing to check to see if the brake shoes were up against the wheels on the caboose before making the drop.

8. failing to check to see if air was bled off of the caboose.

9. failing to make such inspection of the equipment as would have been made by a reasonable person under the circumstances in question.

Contributory negligence is a defensive claim and the burden of proving that claim, by a preponderance of the evidence, is upon the defendant who must establish:

1. That the plaintiff was also *negligent;* and
2. That such negligence was a *legal cause* of the plaintiff's own damage.

If you find in favor of the defendant on this defense that will not prevent recovery by the plaintiff, it only reduces the amount of plaintiff's recovery. If you find that the accident was due partly to the negligence of the plaintiff, then you must determine what percentage of the negligence lies with defendant and what percentage with the plaintiff. The exact percentage is entirely for you to decide from a preponderance of the evidence submitted to you.

You are instructed that that term *negligent* and *legal cause* have the same definitions as heretofore given.

You are further instructed that you may not find contributory negligence on the part of the plaintiff, however, simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.

Plaintiff's second claim is based upon the Federal Boiler Inspection Act. Plaintiff claims that the engine and appurtenant parts involved in the subject accident were in violation of the Federal Boiler Inspection Act in that the

locomotive was smoking so badly as to require the crew to make the move they were making at the time of the subject accident; and the radio in said locomotive was inoperative at the time of the subject accident.

In that regard, the relevant provision of the Federal Boiler Inspection Act is as follows:

Section 23 of the Federal Boiler Inspection Act provides in part that

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb . . . .

If you should find from a preponderance of the evidence that the defendant violated the provisions of the Boiler Inspection Act, as alleged, and that the violation played any part, no matter how small, in bringing about or actually causing injury to the plaintiff, then the plaintiff is entitled to recover from the defendant such damages as the jury shall find from a preponderance of the evidence that the plaintiff actually sustained as a result of the violation without any requirement of a showing of negligence on the part of the defendant.

You are further instructed that contributory negligence is not a defense in whole or in part to damages caused by a violation of the Federal Boiler Inspection Act.

Defendant denies in whole plaintiff's claims under the Federal Boiler Inspection Act.

Plaintiff's third claim is based upon the Federal Safety Appliance Act. Specifically, plaintiff claims that the air brake system on the caboose involved in the accident did not efficiently release the brakes at the time of the subject accident.

In that regard, the relevant provision of a regulation enacted pursuant to section 9 of the Federal Safety Appliance Act provides in part that

> The [braking mechanisms] conforming to the requirements of these specifications shall be so construed, installed and maintained as to be safe and suitable for service.

If you should find from a preponderance of the evidence that the defendant violated the provisions of the Federal Safety Appliance Act, as alleged, and that the violation played any part, no matter how small, in bringing about or actually causing injury to the plaintiff, then the plaintiff is entitled to recover from the defendant such damages as the jury shall find from a preponderance of the evidence that the plaintiff actually sustained as a result of the violation without any requirement of a showing of negligence on the part of the defendant.

You are further instructed that contributory negligence is not a defense in whole or in part to damages by a violation of the Federal Safety Appliance Act.

Defendant denies in whole plaintiff's claims under the Federal Safety Appliance Act.

You are the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given their testimony; but you are bound to receive the law from the Court as stated herein and be governed accordingly.

Now, bearing in mind the foregoing instructions, as well as further directions later given in this charge or orally, you will return herein answers to the following interrogatories, or to such of them as may be necessary, according to specific explanations in connection with said interrogatories.

DATED this 9th day of September, 1981.

/s/ ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO. CA 4-80-22-E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RODNEY E. DOMINEY

VS.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY

VERDICT OF THE JURY

(Filed September 10, 1981)

We, the Jury, return our answers to the following questions as our verdict in this case.

QUESTION NO. 1:

A. Do you find from a preponderance of the evidence that defendant directed the locomotive to back up before the caboose on which Dominey was riding was clear of the fouling/clearance point?

ANSWER:

(√) Yes

( ) No

If you have answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 2.

B. Do you find from a preponderance of the evidence that such action was negligence?

ANSWER:

(√) Yes

( ) No

If you have answered Part B "Yes" then answer Part C; otherwise proceed to Question No. 2.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

(√) No

QUESTION NO. 2:

A. Do you find from a preponderance of the evidence that defendant failed to stop the backward movement of the locomotive units when the person giving the back-up signal, conductor/brakeman Aydelotte, disappeared from view?

ANSWER:

(√) Yes

( ) No

If you have answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 3.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

(√) No

If you have answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 3.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 3:

A. Do you find from a preponderance of the evidence that defendant failed to provide an adequate and functioning radio on the locomotive in question?

ANSWER:

(√) Yes

( ) No

If you have answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 4.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

(√) Yes

( ) No

If you have answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 4.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

(√) No

QUESTION NO. 4:

A. Do you find from a preponderance of the evidence that defendant failed to sound the locomotive whistle before beginning the backing movement?

ANSWER:

(√) Yes

( ) No

If you have answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 5.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

(√) No

If you have answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 5.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 5:

A. Do you find from a preponderance of the evidence that defendant failed to adequately warn plaintiff Rodney Dominey of the backward movement of the locomotive?

ANSWER:

( ) Yes

(√) No

If you have answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 6.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you have answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 6.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 6:

A. Do you find from a preponderance of the evidence that defendant failed to adequately bleed the ca-

boose air system and inspect the handbrakes to insure that the caboose would, in fact, roll freely during the dropping movement?

ANSWER:

( ) Yes

(√) No

If you have answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 7.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you have answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 7.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 7:

A. Do you find from a preponderance of the evidence that defendant failed, under all the evidence presented, to provide plaintiff Rodney Dominey a reasonably safe place to work?

ANSWER:

( ) Yes

(√) No

If you have answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 8.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you have answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 8.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 8:

A. Do you find from a preponderance of the evidence that the radio in the locomotive in question was inoperative at the time of the accident in question?

ANSWER:

(√) Yes

( ) No

If you answered Part A "Yes" answer Part B; otherwise, proceed to Question No. 9.

B. Do you find from a preponderance of the evidence that the inoperative condition of the radio made the locomotive in question improper and unsafe to operate without unnecessary peril to life or limb?

ANSWER:

( ) Yes, it was improper and unsafe to operate without unnecessary peril to life or limb.

(√) No, it was *not* improper and unsafe to operate without unnecessary peril to life or limb.

If you answered Part B "Yes, it was improper and unsafe to operate without unnecessary peril to life or limb" answer Part C otherwise, proceed to Question No. 9.

C. Do you find from a preponderance of the evidence that the inoperative radio played any part, no matter how small, in bringing about or actually causing injury to plaintiff?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 9:

A. Do you find from a preponderance of the evidence that defendant failed to maintain the brakes on the caboose in question, including the braking mechanisms involved, so as to be safe and suitable for service?

ANSWER:

( ) Yes

(√) No

If you answered Part A "Yes" answer Part B; otherwise, proceed to Question 10.

B. Do you find from a preponderance of the evidence that the failure to maintain the brake system, if any, on the caboose played any part, no matter how small, in bringing about or actually causing injury to plaintiff on the occasion in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 10:

A. Do you find from a preponderance of the evidence that the locomotive was smoking so badly as to require the crew to make the move they were making at the time of the accident in question?

ANSWER:

( ) Yes

(√) No

If you answered Part A "Yes" answer Part B; otherwise, proceed to Question No. 11.

B. Do you find from a preponderance of the evidence that the smokey condition made the locomotive in question improper and unsafe to operate without unnecessary peril to life or limb?

ANSWER:

( ) Yes, it was improper and unsafe to operate without unnecessary peril to life or limb.

( ) No, it was *not* improper and unsafe to operate without unnecessary peril to life or limb.

If you answered Part B "Yes, it was improper and unsafe to operate without unnecessary peril to life or limb" answer Part C; otherwise, proceed to Question No. 11.

C. Do you find from a preponderance of the evidence that the smoking locomotive played any part, no matter how small, in bringing about or actually causing injury to plaintiff?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 11:

If you have answered "Yes" to *any* of the following questions: 1C, 2C, 3C, 4C, 5C, 6C, 7C, 8C, 9B, or 10C; then answer Question No. 11; otherwise, answer no further questions.

In considering the issue of plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the plaintiff's damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendant. Neither can damages be based on speculation because it is only actual damages—what the law calls compensatory damages—that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury—tangible and intangible. They are an attempt to restore the plaintiff, that is, to make him whole or as he was immediately prior to his injuries.

You are instructed that a person who has a condition or disability at the time of an injury is not entitled to recover damages therefor. However, he is entitled to recover damages for any aggravation of such preexisting condition or disability proximately resulting from the injury.

This is true even if the person's condition or disability made him more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.

Where a preexisting condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation.

Answer separately in dollars and cents, if any, to each of the following elements of damage, to the extent you find them proved by a preponderance of the evidence. You are instructed not to reduce the amount of your answers because of the negligence, if any, of the plaintiff. You are further instructed that the amount of damages found by you will not be subject to any income tax and you should not consider such taxes in fixing the amount of damages.

You are instructed not to consider any medical and hospital expenses, if any, that plaintiff has incurred from the date of the accident in question until the date of this trial. The parties have stipulated that such expenses have been fully paid by defendant.

A. What sum of money, if any, if now paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate plaintiff for the reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by the plaintiff since the injury, because of being unable to pursue his occupation, as a legal cause of the injury. In determining this amount, you should consider any evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost, had he not been disabled.

Answer in dollars and cents, or none.

ANSWER: .....

B. What sum of money, if any, if now paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate plaintiff for any pain, suffering and mental anguish, if any, that he has sustained from the date of the occasion in question until the date of this trial as a legal cause of the injury?

Answer in dollars and cents, or none.

ANSWER: .....

In determining reasonably certain *future damages,* if any, the jury should consider the life expectancy of the plaintiff.

According to a table of mortality the life expectancy of a male person aged 31 years is 40.9 additional years. Life expectancy, as shown by a mortality table, is merely an estimate of the probable average remaining length of life of all persons in the United States of a given age and sex, and that estimate is based upon a limited record of experience. So, the inference which may reasonably be drawn from life expectancy, as shown by the table, applies only to one who has the average health and exposure to danger of people of that age and sex. In determining the reasonably certain life expectancy of the plaintiff, the jury should consider, in addition to what is shown by the table of mortality, all other facts and circumstances in evidence in the case bearing upon the life expectancy of the plaintiff, including his occupation, habits, past health record and present state of health. When considering life expectancy, in determining any reasonably certain future damage, the jury will bear in mind, of course, the distinction between entire-life expectancy and work-life expectancy. Those elements of damage related to future earnings should be measured only by the plaintiff's remaining work life expectancy.

You are further instructed that in the event that you find from a preponderance of the evidence that defendant is liable for future damages, if any, then it becomes the duty of the jury to ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under the circumstances, the result is that the plaintiff will in effect be reimbursed in advance of the loss, and

so will have the use of money which he would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump sum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lump sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from the total amount of anticipated future loss whatever the amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time; and include in the verdict an award for only the present worth —the reduced amount—of the total anticipated future loss.

Bear in mind that your duty to discount to present value applies to loss of future earnings or future medical expenses. If you should find that the plaintiff is entitled to damages for future pain and suffering or future mental anguish, then such award is not subject to any reduction for present use.

C. What sum of money, if any, if now paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate plaintiff for any reasonable and necessary expense to the plaintiff for medical, surgical, hospital and other services and care and supplies, which you find from the evidence in the case are reasonably certain to be required in future treatment of the plaintiff, as a legal cause of the injury in question?

Answer in dollars and cents, or none.

ANSWER: .....

D. What sum of money, if any, if now paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate plaintiff for any loss of future earning power, proximately caused by the injury in question, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future. In determining this amount, you should consider what plaintiff's health, physical ability and earning power were before the accident and what they are now; the nature and extent of his injuries, whether or not they are permanent, the extent of their duration; all to the end of determining, first, the effect, if any, of his injury upon his future earning capacity, and, second, the present value of any loss of future earning power, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future, as a legal cause of the injury in question.

Answer in dollars and cents, or none.

ANSWER: .....

E. What sum of money, if any, if now paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate plaintiff for any pain, suffering and mental anguish, which you find from a preponderance of the evidence that plaintiff is reasonably certain to suffer in the future as a legal cause of the injury?

Answer in dollars and cents, or none.

ANSWER: .....

QUESTION NO. 12:

A. Do you find from a preponderance of the evidence that the plaintiff failed to keep a proper lookout for his own safety on the occasion in question?

ANSWER:

( ) Yes

( ) No

If you answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 13.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 13.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 13:

A. Do you find from a preponderance of the evidence that the plaintiff failed to look at the engines before stepping off of the caboose on the occasion in question?

ANSWER:

( ) Yes

( ) No

If you answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 14.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 14.

C. Do you find from a preponderance of the evidence that failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 14:

A. Do you find from a preponderance of the evidence that the plaintiff failed to determine that the engines in question had started moving back to the north on the occasion in question?

ANSWER:

( ) Yes

( ) No

If you answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 15.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 15.

C. Do you find from a preponderance of the evidence that failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 15:

A. Do you find from a preponderance of the evidence that the plaintiff failed to notify other members of the crew that the caboose was not rolling free on the occasion in question?

ANSWER:

( ) Yes

( ) No

If you answered Part A "Yes" answer Part B; otherwise, proceed to Question No. 16.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you answered Part B "Yes" answer Part C; otherwise, proceed to Question No. 16.

C. Do you find from a preponderance of the evidence that such failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 16:

A. Do you find from a preponderance of the evidence that the plaintiff failed to check to see if the brake shoes were up against the wheels on the caboose before making the drop on the occasion in question?

ANSWER:

( ) Yes

( ) No

If you answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 17.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you answered Part B "Yes" answer Part C; otherwise, proceed to Question No. 17.

C. Do you find from a preponderance of the evidence that failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 17:

A. Do you find from a preponderance of the evidence that the plaintiff failed to check to see if the air was bled off of the caboose on the occasion in question?

ANSWER:

( ) Yes

( ) No

If you answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 18.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you answered Part B "Yes" then answer Part C; otherwise proceed to Question No. 18.

C. Do you find from a preponderance of the evidence that failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 18:

A. Do you find from a preponderance of the evidence that the plaintiff failed to make an inspection of the equipment on the occasion in question?

ANSWER:

( ) Yes

( ) No

If you answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 19.

B. Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER:

( ) Yes

( ) No

If you answered Part B "Yes" then answer Part C; otherwise proceed to Question No. 19.

C. Do you find from a preponderance of the evidence that failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

QUESTION NO. 19:

A. Do you find from a preponderance of the evidence that the plaintiff dropped the caboose on the main line on the occasion in question?

ANSWER:

( ) Yes

( ) No

If you have answered Part A "Yes" then answer Part B; otherwise, proceed to Question No. 20.

B. Do you find from a preponderance of the evidence that such act was negligence?

ANSWER:

( ) Yes

( ) No

If you answered Part B "Yes" then answer Part C; otherwise, proceed to Question No. 20.

C. Do you find from a preponderance of the evidence that failure was a legal cause, in whole or in part, of the accident in question?

ANSWER:

( ) Yes

( ) No

If you have answered "Yes" to *any* of the following questions: 12C, 13C, 14C, 15C, 16C, 17C, 18C, or 19C then answer Question No. 20; otherwise, answer no further questions.

QUESTION NO. 20:

What percentage of the negligence that caused the occurence in question do you find from a preponderance of the evidence to be attributable to each of the parties found by you to have been negligent?

The percentage of the negligence attributable to a party is not necessarily measured by the number of acts or omissions found.

In answering this question you should consider only the negligence of plaintiff and defendant that you have found to be a legal cause of the occurrence in question; therefore, the percentages should total 100%.

Answer by stating the percentage, if any, opposite each name.

ANSWER:

The Atchison, Topeka, and Santa Fe Railway Company ..... %

Rodney E. Dominey ..... %

Total 100 %

September 10, 1981

/s/ J. Arley Moore
Foreman

September 9, 1981

/s/ Eldon B. Mahon
United States District Judge